

Citation: Morrissey Creek Building Supplies Ltd. and
Mike Combs (Re)
2024 BCEST 38

EMPLOYMENT STANDARDS TRIBUNAL

Applications for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Morrissey Creek Building Supplies Ltd.

– and –

Mike Combs

- of Decisions issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2024/022 & 2024/023

DATE OF DECISION: April 30, 2024

DECISION

SUBMISSIONS

Mike Combs and Erica Boyko

on behalf of Mike Combs and Morrissey Creek Building Supplies Ltd.

OVERVIEW

1. I have before me two separate, but related, applications for reconsideration filed under section 116 of the *Employment Standards Act* (“*ESA*”). The application in Employment Standards Tribunal (“EST”) File No. 2024/022 concerns appeal decision 2024 BCEST 3, and the application in EST File No. 2024/023 concerns appeal decision 2024 BCEST 4. Both applications were filed outside the 30-day reconsideration application period and, accordingly, the applicants seek an extension of the reconsideration application periods under section 109(1)(b) of the *ESA*.
2. In my view, there is no proper basis for extending the reconsideration application periods and, in any event, both applications are entirely without merit. That being the case, both section 116 applications must be summarily dismissed. My reasons for reaching that conclusion now follow.

PRIOR PROCEEDINGS

The Determinations

3. On June 21, 2023, Mathew Osborn, a delegate of the Director of Employment Standards (“delegate”), issued a determination ordering Morrissey Creek Building Supplies Ltd. (“Morrissey Creek”), a now-defunct retailer in Grand Forks, to pay a former employee (“complainant”) \$5,169.00 (including section 88 interest) as compensation for length of service payable under section 63 of the *ESA* and concomitant vacation pay. The delegate also levied a single \$500 monetary penalty against Morrissey Creek (see section 98), thus bringing the total amount payable under this determination to \$5,669.00.
4. It should be noted that Morrissey Creek, despite the many efforts of Employment Standards Branch staff to obtain its evidence and argument during the complaint investigation process (discussed in detail in the delegate’s reasons appended to the Morrissey Creek determination), did not participate in the investigation that preceded the issuance of the determination against it. I understand that Morrissey Creek had ceased business operations by the time the determination was issued.
5. According to the information contained in the BC Registry Services database, Mike Combs was the sole director of Morrissey Creek during the entire period of the complainant’s employment with that firm. On June 21, 2023, the same day as the issuance of the determination against Morrissey Creek, the delegate issued a determination against Mr. Combs under section 96 of the *ESA* in relation to the complainant’s unpaid wages (\$5,169.00). This latter provision states that a corporate director can be held personally liable for up to two months’ unpaid wages for each employee of the corporation. It should be noted that Mr. Combs has never challenged his status as a Morrissey Creek director when the complainant’s unpaid wage claim crystallized, nor has he ever challenged the delegate’s determination regarding the two-month unpaid wages calculation. Indeed, in his appeal (and also in his reconsideration application), Mr.

Coombs never raised *any* matter that can be properly advanced in an appeal of a determination issued under section 96.

The Appeals

6. The deadline for appealing the two determinations to the Tribunal, each of which was served by ordinary mail, was July 31, 2023 (see section 112(3) of the *ESA*).
7. On July 31, 2023, Ms. Erica Boyko sent an email to the Tribunal which stated: “I do not believe [the complainant] is entitled to receive moneys as he failed to show up for his shifts and had walked away from his job so states quit” [*sic*]. Ms. Boyko appended Appeal Forms to this email on behalf of Morrissey Creek and Mr. Combs.
8. On August 17, 2023, Erica Boyko sent a second brief email to the Tribunal which stated:

as per conversations with victoria please see following for an extension to sept 30-2023. please inform me if I should be missing anything as this is my first time of completing a tribunal thank you! erica boyko [*sic*]

Ms. Boyko appended the following documents to her August 17th email: an Appeal Form on behalf of Morrissey Creek, a one-paragraph handwritten note (signed by Ms. Boyko and Mr. Combs), and some other documents.

9. On August 21, 2023, Ms. Boyko sent another very brief email to the Tribunal in relation to the appeal filed on behalf of Mr. Combs: “Extension request for Mike Combs should you have any questions please call Erica [number omitted]” [*sic*].
10. Both appeals were nominally based on the “new evidence” ground of appeal (section 112(1)(c) of the *ESA*).

The Appeal Decisions

11. In appeal decision 2024 BCEST 3, Tribunal Member Goldvine dismissed Morrissey Creek’s appeal as having no reasonable prospect of succeeding (see section 114(1)(f) of the *ESA*). Although Member Goldvine noted that this appeal was untimely (see para. 11), he concluded that the appeal should be dismissed under section 114(1)(f), rather than being dismissed as untimely under 114(1)(b). Member Goldvine concluded that Morrissey Creek was not denied procedural fairness regarding the manner in which the complaint investigation was conducted and, additionally, concluded that none of Morrissey Creek’s “new evidence” was admissible in light of the criteria established in *Davies et al.*, BC EST # D171/03.
12. Member Goldvine addressed Mr. Combs’ personal appeal in appeal decision 2024 BCEST 4. Although Member Goldvine concluded that the appeal was untimely (see para. 5), he rested his decision on his finding that the appeal had no reasonable prospect of succeeding, especially since there was no evidence that Mr. Combs was not a corporate director at the relevant time, or that there was any error made in calculating his unpaid wage liability.

13. Both appeal decisions were issued on January 18, 2024. Section 116(2.1) of the *ESA* states that a reconsideration application must be filed not “more than 30 days after the date of the order or decision.”

THE APPLICATIONS FOR RECONSIDERATION

14. On February 23, 2024, Ms. Boyko sent an email to the Tribunal which stated: “good afternoon i am sending in the forms for an extension on the reconsideration” [*sic*]. Ms. Boyko attached a “Reconsideration Application Form” on behalf of Morrissey Creek, and a second form on behalf of Mr. Combs, as well as a 1 ½-page handwritten memorandum, which referenced both the Morrissey Creek and the Combs determinations.
15. In this latter unsigned memorandum, it was stated that “extra time [was required] to get the reconsideration done,” and that a 2022 brain injury was causing Mr. Combs “trouble.” The memorandum also referred to a “record of employment” which stated that the complainant had “quit.” I should note that records of employment are issued by an employer. This latter document has no probative value regarding whether the complainant was entitled to section 63 compensation. The memorandum also appears to challenge the section 88 interest component of both determinations. Section 88 interest is mandatory, and the Tribunal has no statutory authority to waive the payment of interest on unpaid wage awards. The memorandum also indicated that “all employees were offered jobs at Homehardware once Morrissey Creek closed there doors in June 2021 more letters to follow” [*sic*]. This statement is not corroborated by any independent evidence and, in particular, there is no independent evidence that the complainant was offered employment so as to trigger section 97 of the *ESA*.
16. On February 26, 2024, the Tribunal’s Registry Administrator directed Ms. Boyko to file whatever further evidence or argument she wished to submit by no later than 4 PM on April 2, 2024. No further documents were ever filed.

ANALYSIS

17. These two section 116 applications are untimely, albeit they are not unduly late. Even so, the applicants have not provided any cogent and credible explanation for their failure to file timely applications. Although there is a reference to a “brain injury” in the memorandum attached to the reconsideration application forms (apparently, this was suffered by Mr. Combs in October 2022), there is no corroborating medical evidence before me with respect to this injury. In particular, there is no evidence demonstrating that this injury prevented Mr. Combs from filing timely applications, or from instructing someone to file timely applications on his and Morrissey Creek’s behalf. Further, Ms. Boyko, rather than Mr. Combs, appears to have been the principal person responsible for filing both section 116 applications. This memorandum also refers, rather obliquely, to some ongoing effort to obtain additional documents from the successor to Morrissey Creek’s retail operation. Whatever these documents might be, they should have been obtained and submitted to the Tribunal as part of the appeal process. In any event, these documents, even if they were obtained and submitted to the Tribunal as part of the present section 116 applications, would almost certainly be inadmissible in these proceedings. Accordingly, there is simply no justification for making a section 109(1)(b) extension order in these two files.
18. Further, even if I were inclined to extend the reconsideration application periods, there is absolutely no merit to either application. Neither application passes the first stage of the two-stage *Milan Holdings* test

(*Director of Employment Standards*, BC EST #D313/98) since there is no credible basis for questioning the correctness of either appeal decision. I should note that the applicants have not made any submission which would demonstrate, even on a *prima facie* basis, that either appeal decision is tainted by a legal error or some other fundamental flaw.

ORDER

19. Pursuant to section 116(1)(b) of the *ESA*, I confirm appeal decisions 2024 BCEST 3 and 2024 BCEST 4.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal